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In the Supreme Court of the United States

OCTOBER TERM, 1966

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Answer of Intervenor Pacific Maritime Association to Memorandum for the United States

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The Solicitor General urges this court to grant certiorari to review the decision of the Court of Appeals for the District of Columbia. The Court of Appeals decision unanimously affirmed the Federal Maritime Commission (FMC) on the authority of this court's fundamental decision in *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966).

The Solicitor General's brief contains many misstatements of fact that conflict with uncontroverted testimony,[1] and it asserts that many concessions have been made that are refuted by the briefs and opinions below. However, at this junction we direct the Court's attention to two fundamental misconceptions of fact upon which his entire position is predicated, neither of which "facts" are true or find any support in the record:

1. That the arrangements adopted by the members of an employer collective bargaining group to fund fringe benefits guaranteed in a collective bargaining agreement negotiated with the certified collective bargaining representative are unrelated to the collective bargaining process and the collective bargaining agreement and, therefore, present no question of labor relations (Solicitor General's brief, pgs. 2, 7-9), and

2. That the arrangements adopted by the Pacific Maritime Association (PMA) to fund the fringe benefits guaranteed by the ILWU-PMA Mechanization and Modernization Agreement were designed to *require* that the costs incurred by its stevedore members would automatically be passed on to shippers via higher charges for longshore services (Solicitor General's brief, pgs. 6-8).

These crucial factual conclusions are contrary to uncontroverted evidence and, equally importantly, are contrary to the conclusions of the FMC and the Court of Appeals.

The Supreme Court has, time and again, stated that it will not grant certiorari to review factual determination *unless* it clearly appears that the Court of Appeals in reviewing the agency decision

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1. A most flagrant disregard of the record is shown by the Solicitor General's statement that there had been no consistent practice as to whether automobiles are manifested on a weight or measurement basis. The Trial Examiner in Finding 9, particularly footnote 11 thereto, found that "at all times here involved automobiles were considered measurement cargo in foreign commerce." (R 621a.) That finding is supported by substantial evidence. (R 110a-111a, 218a.) The Trial Examiner also noted that Volkswagen cargoes carried under charter where the entire ship was hired by petitioner were manifested on a unit basis, since neither measurement nor weight is relevant when cargoes are carried under charter arrangements involving full shiploads. (R 621a-622a *cf.* R 99a, 100a, 110a, 112a, 217a-218a.)

has "grossly misapplied" the substantial evidence rule.[2] The Solicitor General is now in the surprisingly novel position of asking this court to grant certiorari when the findings, supported by *uncontroverted* evidence, demonstrate that the factual premises upon which his argument rests are false.

I. The Method Adopted by the Pacific Maritime Association to Raise the ILWU-PMA Mechanization Fund Implements and Is an Integral Part of the Collectively Bargained ILWU-PMA Mechanization and Modernization Agreement.

The agreement attacked in the Solicitor General's brief was negotiated by Mr. Paul St. Sure, President of PMA, and by Harry Bridges, President of the ILWU. Mr. St. Sure was, prior to his death in 1966, probably the single most experienced management negotiator on the Pacific Coast. His experience ranged over many industries and he was respected by management and labor alike. (R 179a, 181a-183a.)

Mr. St. Sure's uncontroverted testimony was that industry-wide fringe benefit programs are commonly negotiated whereby the employers "agree to guarantee a set of benefits", reserving the right to determine the method of funding the benefits. (R 215a.) Mr. St. Sure also made clear that this method is an indispensable part of the collective bargaining negotiations because the ILWU, which serves as joint trustee of the Mechanization Fund, is "alert as to whether or not the method" is working; it considers itself entitled to the money "to spend in accordance with the Agreement." (R 211a.)

Not surprising, therefore, was Mr. St. Sure's testimony that not only did the negotiation with the ILWU encompass consideration of the various methods of funding fringe benefits (R 206a-

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2. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951) (companion case); see also *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 69 (1961); *FTC v. Standard Oil Co.*, 355 U.S. 396, 401 (1958); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 410 (1952).

209a), but in fact the ILWU proposed that contributions to the Mechanization Fund be made under a tonnage formula identical with that ultimately adopted by the PMA members. (R 209a-210a.) This proposal was rejected, according to Mr. St. Sure, because the negotiators were "fearful that if by contract we agreed to a tonnage tax that this would become a contractual formula which would persist beyond the five year term." (R 210a.) The ILWU was persuaded to accept, in lieu of a fixed sum per man hour or a fixed sum per ton handled, a lump sum of $29,000,000 which had been ascertained to be the amount actuarially necessary to provide the negotiated benefits. (R 206a-207a, 221a-222a.)

Mr. St. Sure's testimony makes clear that, having agreed with the ILWU on the scope of benefits, good faith bargaining required prompt collection of the fund by PMA members under an administratively feasible formula. (R 211a, 216a-217a.) PMA staff committees thereafter studied the problem of implementing the Mechanization Agreement and finally recommended as the most reasonable method the one proposed by ILWU during negotiations. (R 209a-210a; Ex. 5A at pg. 466a-474a.) The ILWU-PMA Mechanization and Modernization Agreement was submitted to vote by PMA members *concurrently* with the PMA staff committee recommendations that employers of dockworkers should contribute to the Mechanization Fund on a tonnage basis calculated to assure collection of the sum promised ILWU. (R 216a.) The basic PMA-ILWU agreement and the funding plan were thus ratified simultaneously. Mr. St. Sure's testimony is unequivocal: the funding method and the ratification of the contract were considered concurrently because it was recognized by all the interested persons that they were a *single contractual obligation.* (R 216a, 230a.)

In the face of this testimony, from one of the nation's respected experts on the collective bargaining process, it is incredible that the Solicitor General can assert that the method employed in providing funds necessary to finance employee benefits guar-

anteed by the Mechanization Agreement "is not a part of that contract and involves no question of labor relations." (Solicitor General's Brief p. 8.) To reach this conclusion the Solicitor General is required to misstate the record by asserting that "the union ultimately disclaimed all interest in how the fund would be raised." (Solicitor General's Brief, pg. 2.) Again the undisputed evidence is to the contrary:. Mr. St. Sure testified that ILWU maintained "a continuing interest and continuing concern as to whether or not the collections under the fund were being met." (R 211a.) When asked whether ILWU was unconcerned as to the specific method adopted to assure such collections, Mr. St. Sure made clear that PMA could not fund the Mechanization Plan by a method that could disrupt the industry. He stated at page 212a of the Record:

> I am quite sure that if any agreement had been reached which would have brought about such a result, we would have an obligation, and I am sure the union would insist upon it, to reopen the bargaining and to resume the bargaining as to the means by which the funds were to be collected.
>
> After all, this was a continuing relationship that we have, by the collective bargaining agreement, and my experience would suggest to me that we couldn't have adopted the method which would defeat the very purpose for which we had reached a bargain without having further negotiations.

None could argue that Mr. St. Sure has misconceived the rights of ILWU and the duty of PMA. It is too elementary to require citation that employers are required to bargain in good faith with the unions, and that formal terms of a contract cannot be used to destroy the heart of a bargain. Any labor negotiator or labor lawyer would recognize immediately that the funding of employee benefits necessitates, as an elementary concept of good faith, a recognizable and workable agreement. Unfortunately, the Solicitor General, having no jurisdiction over the national labor laws, is apparently unacquainted with these elementary principles.

We submit the above uncontroverted evidence dictates a conclusion that the Solicitor General's view of the relationship of the funding method to the ILWU-PMA contract must be rejected; funding *was*, to all concerned, part and parcel of the ILWU-PMA Mechanization Agreement.

We also submit that it is the Solicitor General, and not the Commission or Court of Appeals who is "blinking at reality" and elevating form over substance—it is implicit in the Solicitor General's brief that if the method ultimately adopted by the PMA membership had been included *in haec verba* as a provision of the ILWU-PMA Mechanization Agreement, then no question could have been presented under the Shipping Act, 1916, and the entire arrangement would only then constitute a collective-bargaining agreement. How or where the Solicitor General finds authority or reason for this astonishing conclusion we cannot imagine. This is bootstrap legality, and the Solicitor General's view would force parties to parrot every nuance of their negotiations in written form, simply to assure the protection of "collective bargaining agreement" status. To require such embellishment and specificity, where in fact the best bargaining interests of the parties often demand flexibility, is to create paper shibboleths in place of bargaining realities. We had thought that the day of the importance of waxen seals was long past. We can only conclude that the Solicitor General does not think so; we trust that this Court will not agree with him.

II. Labor Costs Resulting from PMA's Implementation of the Mechanization Agreement Were Not Automatically Shifted to Customers of Stevedores.

The heart of the Solicitor General's position (Solicitor General's Brief at 6-8, particularly fns. 6-7) is a premise that increased wage and fringe rates must result in increased prices. The premise assumes that the costs of funding the Mechanization Fund must necessarily have reduced the stevedore's normal profits, and that to recover these "lost" profits, the PMA members must have

passed the mechanization cost on to carriers and shippers through increased rates.

This result is not compelled by logic, and it is here refuted by fact. Increases in wage rates and fringe benefit costs do not necessarily cause an increase in overall labor costs. The facts, established by uncontroverted testimony, disclose that stevedore rates negotiated by petitioner were lower after 1961, notwithstanding that wage rates and fringe benefit costs increased.

1. INCREASED WAGE RATES AND FRINGE BENEFIT COSTS DO NOT NECESSARILY CAUSE AN INCREASE IN TOTAL LABOR COSTS.

Stevedoring is a service industry. Consequently, the single largest cost affecting stevedore rates is labor. We do not deny that stevedore contractors, like other businessmen, must recover their overall labor costs through their charges to customers or go out of business.

Stevedore contractors work under contracts privately negotiated with their customers. (R 126a-127a, 141a, 162a.) The form of the contract may take many different shapes. The most common method to calculate stevedore rates is a commodity rate, but that rate like all other stevedore charges is essentially a cost-plus fee. (R 126a-127a, 220a.) In negotiations with his customer the stevedore spreads his estimated cost items before his customer; they bargain over the efficiency in loading or unloading which can be achieved given these cost items. (R 145a.)

Thus negotiation of a commodity rate involves figures on wage scales, costs of fringe benefits (pensions, welfare, vacations, and mechanization) as well as overhead items such as insurance and clerical and managerial services. (R 127a.) Obviously the costs of the Mechanization Plan, accepted by PMA in exchange for ILWU's acceptance of labor saving cargo-handling operations, were among the many costs included within the mix and ultimately reflected in the commodity rate. (R 127a, 154a.)

It does not follow, however, that such inclusion would necessarily increase the commodity rate. The Solicitor General appears to believe that an increase in the commodity rate could be avoided

only by a reduction in the contractor's profit; hence he asserts illegality because the cost of the mechanization benefits incurred by petitioner's stevedores exceeds their profits. The Solicitor General does not recognize that the commodity rate can be reduced, although the mechanization cost is included in the mix, if the contractor through increased efficiency can reduce other more important labor costs such as direct wages and other fringe costs. Being unschooled in the operations of the stevedore industry and having disregarded the record as a whole, the Solicitor General cannot appreciate this truism, recognized throughout the industry. As Mr. St. Sure testified:

> Well, the whole purpose of the agreement was to improve the efficiency of longshore operations which in turn means to reduce the cost of handling cargo and provide a more efficient operation which, in turn, relates to the faster turn-around time of ships.
>
> We expected to reduce our direct labor costs, both on the average and in detail. By that I mean direct labor costs that the stevedore or the terminal operator had to pay out by having less manhours to pay for.
>
> We likewise expected that, if there was a saving, that this would have some direct benefit to his stevedore and his relationship to his customer as to whatever bargain he made with them, and we assumed, also, that the carriers would probably be aware of the fact that savings were being made, and might sharpen up their pencils in bargaining with the stevedore. (R 219a.)

The Solicitor General's error results from dogmatic acceptance of the premise that increased labor rates always require increased labor costs and, therefore, higher prices. This premise was the basis for early attempts to limit the development of unions. It was then asserted that strong unions would result in a restraint on competition, because uniform wage rates would necessarily cause uniform labor costs and, therefore, uniform prices. This reasoning was first rejected by Congress in the Clayton Act when it declared that labor was not a commodity of commerce.[3] It was

3. Clayton Act, section 6, 15 U.S.C. § 17.

finally laid to rest by this Court in the landmark decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1939).

The premise rejected in *Apex Hosiery* was revived in a new form during the nationwide debate over the effect of industry-wide bargaining. Some urged Congress to prohibit industry-wide bargaining on the ground that identical industry-wide wages restrained competition; the argument was rejected.[4] Former Solicitor General Archibald Cox, today's foremost labor authority, has exposed the fallacy in the assumption that the existence of uniform labor rates in an industry necessarily results in price-fixing:

> Reality departs from the model. Changes in hourly rates do not have the same uniform effect on total costs because of variations in the ratio of labor costs to total costs, in the efficiency of plant, equipment and management and, at least theoretically, in the productivity of labor. The variation would be even wider in an industry where some workers receive piece rates, some are paid hourly rates and still others work under bonus systems. Furthermore, management has shown amazing skill in reducing the cost of wage increases through new machinery, improved engineering and like economies.[5]

The present Solicitor General's views are a variant of the discarded premise concerning the effect of uniform industry-wide wage scales and fringe costs on competition. He has closed his eyes to the uncontradicted testimony that the purpose of the Mechanization Agreement was to reduce direct wage and fringe costs by elimination of the featherbedding which had inflated such costs exorbitantly. He has closed his eyes to the fact that the method adopted by PMA to implement the Mechanization Agreement was designed to further that purpose. The record shows that no carrier dependent upon services of stevedores participating in and bearing the cost of the Mechanization Plan has increased its rates as would be expected if PMA funding arrange-

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4. Cox, *Labor and the Anti Trust Laws—A Preliminary Analysis*, 104 U. Penn. L. Rev. 252, 275 (1955).

5. *Id.* at 278.

ments were designed to shift such costs to the customers of stevedores. (R 125a-126a.) Nor did marine terminals increase their rates, notwithstanding that they, like stevedores, incurred costs under the Mechanization Agreement.

In the face of this record, we simply cannot understand the Solicitor General's view that the Court of Appeals has grossly misapplied the substantial evidence rule in affirming the FMC determination that the funding arrangements were *not* designed to pass on to carriers and shippers the stevedore's costs of participation in the Plan.

2. THE COSTS OF THE MECHANIZATION PLAN INCURRED BY PETITIONER'S STEVEDORES WERE NOT DESIGNED TO BE SHIFTED TO PETITIONER.

Uncontroverted testimony discloses that petitioner renegotiates its stevedore contracts every year. (R 155a, 167a.) It does so because it seeks a lower commodity rate as a consequence of increases in productivity resulting from increases in efficient operations. (R 143a, 155a, 162a.) The ILWU-PMA Longshore Contract concluded in 1960 and effective during 1961 and 1962 resulted in increases in wage rates, welfare assessments, as well as imposition of costs to fund the Mechanization Plan. (R 201a-202a.) *Yet the commodity rate negotiated by petitioner with its stevedore contractor Marine Terminals for operations subsequent to these increases in rates was less than the commodity rate charged prior to such increase in wages and fringes.* (R 155a, 162a.)

The uncontroverted testimony makes clear why the commodity rates were reduced despite substantial increases in wages and fringe benefits: overall labor costs to unload a ship were reduced because more cargo could be put out per dollar of labor cost even under such increased rates. (R. 143a-144a.) Furthermore, cargo handling devices were introduced to reduce the risk of damage to cars (R 144a, 147a-148a); this mitigation of risk should lead to a decrease in insurance costs thus lowering a cost item reflected in the commodity rate. (The testimony is clear that ILWU, prior to adoption of the Mechanization Agreement, "simply resisted anything which the employer introduced" re-

gardless of whether safety or reduction of work opportunities were involved. (R 222a-224a.))

Moreover, a one-man reduction in the size of the stevedore gang required on petitioner's operations was achieved after the Mechanization Agreement was adopted; significantly, petitioner's stevedore admits this gang member was theoretically not required under earlier work practices, but maintenance of the status quo indicated the wisdom of not seeking elimination of an unnecessary employee. (R 157a-158a.) Finally, a material change in attitude resulting in the ending of "wildcat strikes" and "slowdowns" (R 159a) and mitigating the risks of "dead time" that can involve a "substantial amount of money" (R 162a) was achieved by the PMA implementation of the Mechanization Agreement. These are the factors that reduce overall labor and other costs of petitioner's stevedores to permit a reduction in their rates.

The Mechanization Agreement had been negotiated to afford an opportunity to secure such reductions in the stevedore costs. (R 224a-225a, 230a-231a.) The testimony of the Chairman of the Funding Committee makes clear that PMA, which consists of stevedores, marine terminals and ocean carriers, would not realistically be so foolish as to fund the Mechanization Agreement by a method that would *require* the stevedores to shift the mech fund assessments to their carrier customers; to do so would have given 100% of the economic advantage from the Mechanization Agreement to stevedores by allowing them to pocket the savings from the opportunity of operating efficiently. (R 126a-127a.) This is the substantial uncontroverted evidence that supports the FMC determination and Court of Appeals affirmance that PMA members did not agree or intend that the mechanization contribution be shifted on top of stevedore charges by them to their customers.

Moreover, the record discloses that petitioner believes it should enjoy these lower overall labor costs without paying for them:

When petitioner's stevedore contracts were reopened in 1961 for renegotiation, petitioner refused to consider costs incurred

by its stevedores in order to secure efficient operations. (R 154a-155a.) When petitioner's stevedores even offered to reduce their profits and absorb a portion of the costs, petitioner did not bother, its Pacific Coast representative proudly testified, to acknowledge the offer. (R 172a-173a.) Nor did petitioner seek to employ any other stevedore, although there were others in the area who were not members of PMA. (R 173a.) Petitioner's representative was satisfied with the quality of his stevedore's operation (R 173a), but was determined that the stevedore should work at rates determined by petitioner.

Because of this impasse petitioner's stevedores continued to work under earlier commodity rates and, apparently, billed separately their costs arising from the Mechanization Agreement. (R 155a.) This adamant refusal of petitioner to negotiate now misleads the Solicitor General into suggesting that PMA intended that the mechanization charges would be added by stevedores on top of their commodity rates as a special charge. Uncontroverted testimony discloses that this was neither the intent nor the practice of PMA members (R 126a). On the contrary, stevedore contracts were canceled and renegotiated with all labor costs, including mechanization costs, before the parties; the purpose of the renegotiation was to lower and not raise stevedore commodity rates. (R 126a-127a.) Thus, when petitioner observed that its productivity was increasing, negotiation with its stevedore of the latter's commodity rate was reopened by petitioner and a lower commodity rate resulted in 1962 and later. (R 155a, 162a.)

We submit that the Solicitor General, by urging certiorari be granted in this case, is undermining the force of the Court's recent decision in the *Consolo* case. This necessarily results in the Solicitor's urging a view on this Court that disregards uncontradicted testimony and the record as a whole. Moreover, by challenging the PMA action implementing the only collective bargaining agreement to sweep out of an entire industry exorbitant featherbedding costs, the Solicitor General urges upon this Court a policy which would discourage negotiators from developing their own

solutions for industrial labor management problems in the collective bargaining process.

Petition for certiorari should not be granted.

Dated May 30, 1967.

Respectfully submitted,

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